

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of SANDRA D. RAKESTRAW and U.S. POSTAL SERVICE,  
PEACHTREE CITY POST OFFICE, Peachtree City, GA

*Docket No. 99-242; Submitted on the Record;  
Issued December 1, 2000*

---

DECISION and ORDER

Before WILLIE T.C. THOMAS, PRISCILLA ANNE SCHWAB,  
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant has established that she sustained a recurrence of total disability commencing March 12, 1996, causally related to her accepted employment injuries; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

The Office accepted that on March 28, 1992 appellant sustained right shoulder strain, right elbow sprain, right carpal tunnel syndrome and a herniated nucleus pulposus at C5-6, for which she underwent a cervical fusion.<sup>1</sup> Appellant received appropriate compensation benefits, and she returned to limited duty as a modified clerk working on June 10, 1995;<sup>2</sup> she returned to working 20 hours per week on August 19, 1995.

By decision dated July 5, 1996, the Office determined that appellant's light-duty (modified) clerk position fairly and reasonably represented her wage-earning capacity. Appellant thereafter received compensation for her loss of wage-earning capacity.

On August 11, 1996 appellant filed a claim for a recurrence of disability alleging that on March 12, 1996 she became totally disabled for her light-duty position. A March 13, 1996 progress note from Dr. Richard M. Klaus, a Board-certified orthopedic surgeon, noted that magnetic resonance imaging (MRI) showed a solid fusion and microdiscectomy at C5-6, and some foraminal encroachment to the right at C4-5, and that nerve conduction velocity (NCV)

---

<sup>1</sup> On February 28, 1989 appellant had previously been granted a schedule award for a 16 percent permanent impairment of her right arm due to the accepted conditions of thoracic outlet syndrome and right bicipital tendinitis. The 1989 schedule award included impairment of the right arm due to weakness and pain.

<sup>2</sup> Appellant's treating physician, Dr. Klaus, approved as suitable to her partially disabled condition the modified clerk position on May 3, 1995. The offered position required answering telephones, taking messages as needed, preparing bank deposits based on receipts, checking in accountable mail from carriers, and other clerical duties within her physical restrictions.

testing demonstrated a right mild median nerve neuropathy at the wrist. Dr. Klaus opined that appellant's surgery to resolve her right arm pain had failed.

On a Form CA-20a, attending physician's supplemental report, Dr. Klaus diagnosed "intractable neck and left arm pain," checked "yes" to the question of whether appellant's present condition was due to the accepted injuries, and checked "yes" to the question of whether appellant was totally disabled from work. However, an April 22, 1996 note from Dr. Feroze A. Yusufji, a Board-certified orthopedic surgeon, indicated that he did not feel appellant was totally disabled. On June 5, 1996 Dr. Klaus opined that appellant was totally disabled due to a "failed spine syndrome" which he indicated was caused by epidural fibrosis and residual disc disease at C6-7.

By letter dated December 9, 1996, the Office advised appellant of the type of evidence she needed to submit to establish her recurrence claim, which included a physician's rationalized opinion identifying a change in the nature or extent of appellant's injury-related condition.

In response appellant submitted a December 16, 1996 report from Dr. Klaus which noted that appellant's condition had deteriorated since her return to work, and that on March 13, 1996 he had to keep her out of work due to exacerbations of pain, weakness and numbness she experienced at work. Dr. Klaus noted appellant's objective findings of healed scars on her neck, right shoulder and right axilla and persistent and recurrent numbness in the right arm and tenderness over the first dorsal extensor compartment of her right wrist. Dr. Klaus diagnosed failed spine syndrome of the cervical spine which precluded the extra stress of sorting, lifting and moving her right shoulder, neck and arm. He opined that appellant could not return to her former employment.

The Office thereafter referred appellant to Dr. Alan B. Lippitt, a Board-certified orthopedic surgeon, for a second opinion evaluation. By report dated April 16, 1997, Dr. Lippitt reviewed appellant's factual and medical history and current complaints, reported physical examination results, diagnosed right carpal tunnel syndrome and right C6 radiculopathy, and opined that the carpal tunnel syndrome "could very well be related to the work injury." Dr. Lippitt opined, however, that he found "no evidence of any aggravation of her preexisting problems, *i.e.*, thoracic outlet syndrome, bicipital tendinitis, and no evidence of anything to suggest that there is any residual from the radiculopathy and cervical disc herniation, which required surgery...." Dr. Lippitt opined that appellant's carpal tunnel syndrome "in and of itself should not preclude her ability to work in a modified light-duty job."

In a May 19, 1997 medical progress note, Dr. Klaus opined that, because of appellant's slightly positive Phalen's test, and nonacute de Quervain's disease, "she has a weakened right hand and cannot do repetitive motions such as sorting mail, writing and lifting." He recommended that, if she worked, it would be with the limitations as described before.

By decision dated June 30, 1997, the Office rejected appellant's claim for recurrence of disability finding that the evidence submitted in support was insufficient to establish her claim. The Office found that Dr. Klaus did not explain how appellant's limited-duty job caused a material worsening in her condition, and did not identify objective findings supporting that she was totally disabled from work. The Office found that the reports of Drs. Yusufji and Lippitt

constituted the weight of the medical evidence and supported that appellant could work light duty.

By letter dated September 2, 1997, appellant requested reconsideration of her claim, and in support she submitted several reports from Dr. Klaus. By report dated July 15, 1997, Dr. Klaus noted that appellant had “persistent neck and arm pain aggravated by even light duty,” and “recurrent neck, hand and arm pain with work that included answering the [tele]phone, writing up notices for certified letters, and writing forwarding addresses on letters.” Dr. Klaus noted that “[o]bjectively, [appellant] has weakness of grasp in the right upper extremity,” a “decreased brachioradialis on the right,” and “weakness of flexion of the biceps in the right arm.” He noted that, “if she remains at light duty, [she] will still require office visits every four to six weeks for reevaluation and possible injection.”

A July 21, 1997 note from Dr. Klaus reported that at that time appellant had less than 50 percent range of neck motion with rotation, numbness in her index finger and partially in the thumb and middle finger, and persistent carpal tunnel symptoms. He opined that appellant had postoperative fibrosis in her cervical spine, and that she was unable to return to work at the level she was when first seen.

By report dated August 5, 1997, Dr. Klaus opined that appellant’s “carpal tunnel syndrome, chronic pain, anxiety and depression are all secondary to the treatment for the original injury arising from the neck and right upper extremity that required surgeries, all dating back to her original injury of June 10, 1985.”

By decision dated September 23, 1997, the Office denied appellant’s request for modification finding that the evidence submitted in support was insufficient to warrant modification. The Office found that the medical reports submitted lacked objective findings to support total disability, and failed to provide an opinion as to why appellant could not continue to work her light-duty job. The Office found that the medical reports of Drs. Yusufji and Lippitt constituted the weight of the medical evidence and supported that appellant could work light duty.

By letter dated December 29, 1997, appellant again requested reconsideration of her claim.

In support appellant submitted an undated American Postal Workers’ Union letter, a bill dated November 11, 1997 from Georgia Orthopedics, a Blue Cross/Blue Shield explanation of benefits, employing establishment workers’ compensation benefits information and a copy of an October 8, 1997 job offer.<sup>3</sup>

Also submitted were several medical reports.

---

<sup>3</sup> As these publications and statements are either not specific to appellant’s case, or do not bear on whether the medical evidence of record establishes that she sustained a recurrence of total disability on March 12, 1996, they are not relevant to this claim. See *Ronald M. Cokes*, 46 ECAB 967 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

By report dated October 10, 1997, Dr. Kenneth J. Lazarus, a Board-certified neurologist, reviewed appellant's history, examined appellant, and diagnosed chronic severe cervical and trapezius myofascial pain syndrome, right forearm myofascial pain syndrome, probably carpal tunnel syndrome, depression, chronic acromion bursitis, and status post cervical fusion, surgically-treated cervical disc herniations and rib resection. Dr. Lazarus opined that it did not seem likely that appellant would be successful in returning to work and that she was permanently disabled from returning to any work which involved use of her right upper extremity.

An October 15, 1997 disability certificate from Dr. Lippitt stated that appellant "cannot do her job because of repetitive movements which would aggravate her carpal tunnel syndrome."

By report dated October 22, 1997, Dr. Lippitt noted that appellant's major problem was carpal tunnel syndrome, that that diagnosis in and of itself should not preclude her ability to work in a modified light-duty job, that she could not do repetitive motions of the right upper extremity for four to six hours per day, but that it was not unreasonable for appellant to work 20 hours per week with limited right upper extremity repetitive motions.

By report dated November 4, 1997, Dr. Klaus reviewed his treatment of appellant, he reported her objective finding post surgery including global weakness of the right upper extremity, he enumerated her subjective complaints including weakness and dropping objects after 20 to 30 minutes of right upper extremity repetitive motion, morning neck stiffness, and median nerve numbness on the right, and he diagnosed failed neck syndrome post-cervical spine fusion with right upper extremity weakness from tendon transfer in the right shoulder and first rib removal. He also diagnosed developing carpal tunnel syndrome in the right wrist, and opined that appellant could not use her right upper extremity for any form of gainful employment.

By decision dated March 30, 1998, the Office denied modification of the September 23, 1997 decision finding that the evidence submitted in support was insufficient to warrant modification.<sup>4</sup> The Office found that the nonmedical evidence had no probative value in establishing appellant's claim, that the current objective findings reported did not represent a material change from the findings in 1995, and that none of the medical reports addressed how appellant's condition had worsened to the extent that she could no longer perform her 1995 light-duty position.

On April 23, 1998 appellant requested an oral hearing on her claim. Appellant resubmitted medical evidence dating from October 9, 1985 through April 22, 1998.

By decision dated June 29, 1998, the Office's Branch of Hearings and Review noted that appellant was not, as a matter of right, entitled to an oral hearing as she had previously requested and received reconsideration of her case, and it denied her request on the basis that she could equally well address the issue by requesting reconsideration by the Office and by submitting new medical evidence not previously considered.

---

<sup>4</sup> On April 21, 1998 the Office granted appellant an increased schedule award for a total right upper extremity impairment of 26 percent. This award included impairment due to carpal tunnel syndrome.

The Board finds that appellant has failed to establish that she sustained a recurrence of total disability commencing March 12, 1996, causally related to her accepted employment injuries sustained on March 28, 1992.

An employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative and substantial evidence and to show that she cannot perform the light duty.<sup>5</sup> As part of her burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.<sup>6</sup>

In the instant case, appellant has not met this burden of proof.

In this case, appellant submitted multiple reports from Dr. Klaus which reported physical findings that were essentially unchanged from the findings reported in 1995 when she returned to light duty.<sup>7</sup> Dr. Klaus noted that appellant's condition had deteriorated since her return to limited-duty work, and that her limited-duty job caused a material worsening of her condition but he failed to identify any objective evidence of that deterioration or worsening, citing only the subjective occurrence of periodic exacerbations of pain, weakness and numbness which occurred while appellant was working light duty, and he failed to explain how her limited duties caused or aggravated that deterioration or worsening. Dr. Klaus claimed that appellant had "failed spine syndrome" which was due to epidural fibrosis and disc disease at C6-7. The Board notes, however, that disc disease at C6-7 was not a condition accepted by the Office as being employment related, and that Dr. Klaus failed to explain how epidural fibrosis, which occurred over time postoperatively, suddenly caused total disability on March 12, 1996. Further, Dr. Klaus opined in his multiple reports that appellant could not return to her former employment performing repetitive sorting mail, lifting and moving her right shoulder, but he failed to address why appellant could not return to her light-duty position without excessive repetitive motions, which had been developed in accordance with her medical restrictions, and of which he approved as suitable to her partially disabled condition on May 3, 1995.

Moreover, in support of appellant's claimed March 12, 1996 recurrence of total disability, Dr. Klaus only checked "yes" to the question of whether she was totally disabled from work, and "yes" to the question regarding causation. No explanation was given as to how the nature or extent of appellant's accepted conditions had changed, causing a recurrence of total disability. The Board has held that, when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion has little probative value and is insufficient to establish a claim.<sup>8</sup> As Dr. Klaus' reports are

---

<sup>5</sup> *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>6</sup> *Id.*

<sup>7</sup> Dr. Klaus reported findings of healed scars of appellant's neck, right shoulder and right axilla, and recurrent numbness in the right arm, and the suggestion of right carpal tunnel syndrome, all of which were noted to be in existence prior to her return to light duty.

<sup>8</sup> *See Beverly J. Duffey*, 48 ECAB 569 (1997); *Alberta S. Williamson*, 47 ECAB 569 (1996).

unrationalized and contain no new evidence of the March 12, 1996 recurrence of objective disability or objective change in any of appellant's conditions, they are not supportive of appellant's claim. Consequently, none of Dr. Klaus' reports are sufficient to establish that appellant sustained a recurrence of total disability on March 12, 1996.

Following Dr. Klaus' reports, other physicians opined that appellant was not totally disabled due to her accepted employment-related conditions. On April 22, 1996 only one month after appellant's claimed recurrence of total disability Dr. Yusufji indicated that he did not feel that appellant was totally disabled. Thereafter, on April 16, 1997 Dr. Lippitt, the Office's second opinion specialist, opined that he found no evidence of any aggravation of her preexisting problems, and no evidence of injury-related residual. He opined that appellant could work in a modified light-duty job. He further opined on October 22, 1997 that it was not unreasonable for appellant to work 20 hours per week with limited right upper extremity repetitive motions. As neither of these physicians found that appellant became totally disabled on March 12, 1996, their reports do not support appellant's recurrence claim.

Another physician, Dr. Lazarus, opined that it did not seem likely that appellant could return to work which involved use of her right upper extremity; however, he attributed this disability in part to several conditions not accepted by the Office as being employment related, including trapezius myofascial pain syndrome, right forearm myofascial pain syndrome, depression and chronic acromion bursitis. Disability due to any of these would, therefore, not be compensable under the Federal Employees' Compensation Act. Further, Dr. Lazarus did not address appellant's condition on March 12, 1996 or explain how or why she became totally disabled for her limited-duty job on that date. Therefore, this report does not support appellant's recurrence claim.

As it is appellant's burden of proof to show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements, and as none of the medical evidence of record explains how or why appellant became totally disabled from performing her light-duty position on March 12, 1996, or identified objective evidence or a material change in the nature or extent of her injury-related conditions on that date, appellant has failed to establish her claim.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing under section 8124(b)(1).

Section 8124(b)(1) of the Act provides in pertinent part as follows:

"Before review under [section] 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>9</sup>

---

<sup>9</sup> 5 U.S.C. § 8124(b)(1)

The Office's procedures implementing this section of the Act are found in the Code of Federal Regulations at 20 C.F.R. § 10.131(a). This paragraph, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing, states in pertinent part as follows:

“A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and § 10.138(b) of this subpart prior to requesting a hearing, or if review of the written record as provided by paragraph (b) of the section has been obtained.”<sup>10</sup>

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>11</sup> Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right for a hearing,<sup>12</sup> when the request is made after the 30-day period for requesting a hearing<sup>13</sup> and when the request is for a second hearing on the same issue.<sup>14</sup> In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.<sup>15</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.<sup>16</sup>

In the present case, appellant was timely in her request for an oral hearing, however, as appellant had previously requested and received reconsideration under section 8128, she was not entitled to a hearing under section 8124 on the same issue as a matter of right.

The Office, in its discretion, considered appellant's hearing request in its June 29, 1998 decision, found that appellant had previously requested and received reconsideration on the issue in question, and denied the request on the basis that appellant could pursue her claim by requesting reconsideration and submitting additional evidence supporting that she sustained a recurrence of total disability on March 12, 1996.

---

<sup>10</sup> 20 C.F.R. § 10.131(a).

<sup>11</sup> *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

<sup>12</sup> *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

<sup>13</sup> *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

<sup>14</sup> *Johnny S. Henderson*, *supra* note 10.

<sup>15</sup> *Id.*; *Rudolph Bermann*, *supra* note 11.

<sup>16</sup> *See Herbert C. Holley*, *supra* note 12.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.<sup>17</sup> There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated June 29 and March 30, 1998 are hereby affirmed.

Dated, Washington, DC  
December 1, 2000

Willie T.C. Thomas  
Member

Priscilla Anne Schwab  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member

---

<sup>17</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).